BRIEF
IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.
THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Ohio is reported in *Page v. Wieland,* 137 O. S. 198; 28 N. E. 583.

B.
JURISDICTION.

Jurisdiction is invoked under Title 28 U. S. C. A. Section 344(b), Judicial Code 237(b), as amended by the act of February 13, 1925.

C.
STATEMENT OF THE CASE.

A summary statement of the case is set out under heading "A" in the petition for Writ of Certiorari and for the sake of brevity is incorporated in this brief by reference.

D.
SPECIFICATION OF ERRORS.

1. The Supreme Court of Ohio erred in failing to hold that the Defendant was denied due process under the 14th Amendment when by the court's failure to rule on objections he was deprived of the right to refute the applicability of the ordinances upon which the plaintiff's cause of action was founded.

2. The Supreme Court of Ohio erred in failing to hold that he was denied due process under the 14th Amendment when it approved a judgment against the defendant upon the verdict of a jury which did not have before it the basic facts without which it could not find against him.

3. The Supreme Court erred in dismissing the defendant's application for rehearing, as involving no debatable Federal constitutional question.

SUMMARY OF ARGUMENT.

I.

An Important Question of Federal and Local Law is involved which should be settled by this Court.

II.

The Court's failure to rule upon the defendant's objections to the ordinances deprived him of an opportunity to refute their applicability and denied him due process.

III.

The judgment of the Court below was rendered against him without evidence in the record to support it and denied him due process.

ARGUMENT.

I.

An Important Question of Federal and Local Law is involved which should be settled by this Court.

The plaintiff obtained a judgment against the defendant in the Common Pleas Court of Cuyahoga County. On appeal the Court of Appeals ruled that the judgment was not valid in that it was not founded upon basic facts essential to recovery, to-wit: the ordinances upon which the cause of action was predicated, and for the further reason that the court failed to rule on the defendant's objections to the materiality, relevancy and competency of such ordinances. The Supreme Court of Ohio, upon appeal, reversed the judgment of the Court of Appeals, holding that although the plaintiff had not formally introduced the

ordinances, counsel's admission was tantamount to a concession of their existence, and the trial court's failure to rule on the defendant's objections was cured by his exception to the court's charge. This being the first ruling by an Appellate Court adverse to the defendant, he thereupon timely filed an application for a rehearing, wherein he contended that the judgment and holding of the Supreme Court sustaining the trial court's failure to rule on his objections, deprived him of the right to refute the applicability of the ordinances to the building in question, denied him an adequate judicial hearing because evidence necessary for the jury's determination of the issues was not known by them, and that the judgment was therefore entered against him without basis in fact, by reason whereof he was denied due process and equal protection guaranteed him by the 14th Amendment to the United States Constitution. The defendant contends that there is a substantial Federal question in the case to enable this Court to grant Certiorari, in that he was denied a hearing as contemplated by due process:

(1) Because the record conclusively shows and the Supreme Court's opinion admits that the basic ordinances were not introduced into evidence, nevertheless the judgment against him was sustained.

(2) Because the court's failure to rule upon the defendant's objections to the ordinances deprived him of the opportunity to refute their applicability to the building in question.

(3) Because a judgment was rendered against him based upon a verdict returned by a jury which did not have before it and therefore did not know the essential facts necessary for its determination of the issues in the case.

(4) Because the Federal question was raised by the defendant and ruled against him at the first opportunity after a Court of Review ruled adversely to him.

A refusal by a state court to *consider* a Federal question which is controlling in a case, is equivalent to a decision against the Federal right involved therein and gives the Supreme Court jurisdiction to review.

Des Moines Navigation & Railroad Co. v. Iowa Homestead Co., 123 U. S. 552;
Smithsonian Institute v. St. Johns, 214 U. S. 19;
Rogers v. Alabama, 192 U. S. 226, 230.

In more recent cases this Court held that whether the question of the violation of defendant's constitutional rights was adequately presented and was decided in the state court, is itself a Federal question. *Lovell v. Griffin*, 303 U. S. 444; *Schuylkill Trust Co. v. Pa.*, 296 U. S. 113, 121.

That this question was not raised in the trial court is immaterial because the defendant could not and was not obliged to anticipate that the court would fail to rule on his objections and then charge on the ordinances objected to. Under such circumstances though the Federal question was first presented to the State Supreme Court upon an application for a rehearing and was denied without the state court indicating the reason for its ruling upon such question, this Court can assume jurisdiction if the question was presented at the first opportunity.

Whitfield v. Ohio, 297 U. S. 431, 435, 436;
Brinkerhoff, Faris Trust Co. v. Hill, 281 U. S. 673, 677, 678;
Missouri v. Gehner, 281 U. S. 313, 320;
City National Bank v. Durr, 257 U. S. 99;
State, ex rel. Anderson v. Brand, 303 U. S. 95, 98;
Home Ins. Co. v. Dick, 281 U. S. 397.

The denial by the court of the right to refute and explain is a denial of due process of law:

Ohio Bell Telephone Co. v. Public Util. Com., 301 U. S. 292, 300, 302, 303, 304;

Interstate Commerce Commission v. L. & N. R. R. Co., 277 U. S. 88, 91, 93.

"A hearing is not judicial, at least in an adequate sense, unless the evidence can be known."

Ohio Bell Tel. Co. v. Pub. Util. Com., supra;
U. S. v. Abilene & So. Ry. Co., 265 U. S. 274, 288;
The Chicago Junction Case, 264 U. S. 258, 265.

This Court will not permit the foreclosure of a claimants constitutional right because of the state court's findings of fact, which would preclude jurisdiction. It will examine the facts to see whether the evidence adequately sustained the findings.

Davis v. Wexler, 263 U. S. 22, 24;
Truax v. Corrigan, 257 U. S. 312;
Ward v. Love, 253 U. S. 17, 23.

The Intermediary Appellate Court found that the plaintiff did not introduce the ordinances and reversed the judgment of the Court of Common Pleas. The Supreme Court of Ohio did not find to the contrary but held that the act of defendant's counsel in waiving the production and preliminary proof was tantamount to an admission. Such conclusion will not defeat the jurisdiction of this Court if plaintiff has thereby been deprived of due process. The case then falls within the rule that where the state court makes a general or ultimate conclusion of fact, the Supreme Court will review the facts to ascertain whether the litigants' constitutional rights were violated. It is within the rule also that where a conclusion of law and finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question to analyze the facts, this Court will do so.

Norfolk Ry. Co. v. Connelly, 236 U. S. 587, 590;
Fiske v. Kansas, 274 U. S. 380, 385, 396;
Beidler v. South Carolina, 273 U. S. 548;
Aetna Life Insurance Co. v. Dunken, 266 U. S. 389.

The instant case turns not upon a question of fact, but involves a very important principle of law, whether a court may by the simple act of failing to rule upon an objection treat the objected matter in its charge as though it had been properly introduced and deprive the litigant adversely affected, of the opportunity to produce testimony to refute it. Whether such action of a state court contravenes due process is the question before this Court.

Even if there existed a non-federal ground, it was not adequate to support the decision of the court below. In all events the adequacy of the non-federal ground is for this Court to determine in order to safeguard the litigants' constitutional rights as has been stated many times.

Abie State Bank v. Bryan, 282 U. S. 765, 773;
Brood Ry. Co. v. South Carolina, 281 U. S. 537, 540;
Indiana, ex rel. Anderson v. Brand, 303 U. S. 95, 98.

In *Indiana, ex rel. Anderson v. Brand, supra*, the Court said:

> "We cannot refuse jurisdiction because the state court might have based its decision consistently with the record upon an independent and adequate non-federal ground. And since the Amendment to the Judiciary Act of 1789 by the act of Feb. 5, 1867, it has always been held that this court may examine the opinion of the state court to ascertain whether a Federal question was raised and decided and whether the court rested its judgment on an adequate non-federal ground."

The conclusions of the court below are not so binding upon this Court as to exclude its jurisdiction where the Court can take jurisdiction upon broad constitutional grounds.

Acme Harvester Co. v. Buckman, 222 U. S. 305, 330;
Norris v. Alabama, 294 U. S. 587, 589, 590;
Abie State Bank v. Bryan, 282 U. S. 765, 773.

II.

The court's failure to rule upon the defendant's objections to the ordinances deprived him of an opportunity to refute their applicability and denied him due process.

In *Morgan v. U. S.*, 304 U. S. 1, 19 this Court held that the constitutional mandate of due process requires that a "full" hearing shall include the right to present evidence as well as a reasonable opportunity to know the claim of the opposing party and to meet it. This Court has ruled similarly in *Morgan v. U. S.*, 298 U. S. 468, and in *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292.

The Lord Chief Justice Hewart in his work "The New Despotism" at pages 31-32 defines the work of a court as follows:

> "The work of a court involves many important ingredients, as for example:
>
> 1. That the judge is identified and is personally responsible for his decisions.
> 2. That the case, subject to rare exceptions, is conducted in public.
> 3. That the result is governed by impartial application of principles which are known and established.
> 4. That all parties to the controversy are fully and fairly heard.
>
> * * * The administration of the law of the land in the ordinary courts presupposes at least personal responsibility, publicity, uniformity and the hearing of the parties."

The Supreme Court of Ohio, we respectfully submit, by reversing and disapproving the judgment of the Court of Appeals and affirming and approving the judgment and conduct of the Court of Common Pleas has violated Canons Nos. 3 and 4, as well as the American concept of due process. Failure to rule on defendant's objections to matters which if promptly, even though adversely, ruled upon,

would call for rebuttal testimony, and then to charge the jury that they must consider such matters as proven, depriving the defendant of the right to introduce such testimony, denies the litigant that hearing of the parties said by the Lord Chief Justice to be an essential ingredient of the work of the court, and deprives him of a full and fair judicial hearing under the concept of due process of this Court.

While the impartiality of the court below in applying its concept of the legal principles is not questioned or in any manner impugned, we, nevertheless, most earnestly contend that such principles as were enunciated by the court below are not known or well-established. In fact, we submit that they are contrary to the principles enunciated by this Court in *Saunders v. Shaw,* 244 U. S. 317, 319; *Ohio Bell Telephone Co. v. Pub. Util. Com.,* 301 U. S. 292, as regards due process. By the lower court's ruling and judgment the Defendant was deprived of an opportunity to present evidence essential to the determination of the issues in the case. A denial of the right to refute and explain is a denial of due process of law. *I. C. C. v. L. & N. R. R. Co.,* 227 U. S. 88, 91, 93.

> "An objecting opponent is ordinarily entitled to an immediate ruling, before the close of the proponent's case, declaring the evidence admissible or inadmissible, either absolutely or conditionally, insofar as otherwise he would be unable to know what evidence on his part in explanation or rebuttal would be needed."
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> *Wigmore on Evidence,* 3rd Ed. 348, Section 19.

"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known," this Court has said in *Ohio Bell. Tel. Co. v. P. U. C.,* 301 U. S., *supra*; and also in *West Ohio Gas Co. v. Public Utilities Commission,* 265 U. S. 274, 288, and *The Chicago Junction* case, 264 U. S. 258, 263, 264, 265.

The Supreme Court of Ohio swept aside the lower court's failure to rule upon defendant's objections to the relevancy and materiality of the ordinances by the assertion that his rights were saved by the general exception to the charge. No precedent in Ohio or elsewhere is cited to support the court's view that under such circumstances the defendant was not denied due process. The fallacy of this statement is apparent upon inspection thereof. The exception to the court's charge was made at the close of the entire case and prior to the trial court's submission of it to the jury for its consideration. The jury had already been instructed if it found that there was insufficient light it had to find the defendant guilty of negligence because it was in violation of the city ordinances. (R. 29, 30.) An objection by defendant to the charge at this stage of the proceedings, although specially made, was futile. He could do nothing to cure the error because the case was at an end, except for the deliberation by the jury. Had the court ruled upon the objections at the close of the plaintiff's case, the defendant could then have offered testimony to refute the applicability of the ordinances. The court not having ruled upon the objections, thus lulled the defendant into a false sense of security that the ordinances were not in the record. The defendant therefore was not obliged at this stage of the proceedings when he was offering testimony, to introduce evidence to refute that which was not in the record.

To give the answer whether the defendant committed any chargeable acts of omission or commission, the trier of the facts had to weigh the evidence, draw inferences from positive facts, judge credibilities, and, above all, know the terminology of the ordinances, the basic fact upon which plaintiff's whole case rested. The record indicates that all other allegations of negligence were withdrawn from the jury and that there was left for its consideration only one allegation of negligence, to-wit: whether the defendant violated the ordinances of the City of Cleveland referring to

lighting in an apartment house. (Record, page 24.) The jury did not have the benefit of the pleadings which set forth the ordinances. (Record, page 35.) Without the wording of the ordinances before it, the jury could not say what were the defendant's duties and obligations thereunder. Nevertheless, the Supreme Court of Ohio held that since the trial court read a portion of the ordinance which it deemed applicable to the jury, the defendant's rights were sufficiently safeguarded by defendant's exceptions. We believe that precedent and the orderly processes of judicial trial require a contrary ruling. We submit the defendant did not have his day in court and that he was denied that full and fair hearing guaranteed him by the 14th Amendment.

III.

The judgment of the court below was rendered against him without evidence in the record to support it, and denied him due process.

In *Ohio Bell Telephone Co. v. Pub. Util. Com.*, 301 U. S. 292, the Public Utilities Commission undertook to fix a valuation of the Ohio Bell Telephone Company's property for the years 1926 to 1933 in its relation to rates. For this purpose the Commission took judicial notice of price trends in land, labor and engineering construction during those years and referred to findings of an Illinois Federal Court concerning values of an affiliated company. Upon the basis of these findings and such judicial notice, it ordered a refund of charges collected under bonds. The company protested that the Commission could not judicially notice the trend of percentages which did not come from official sources; that they had not been introduced in evidence; that the company was not afforded an opportunity to explain or rebut them, and that it was therefore "denied a fair hearing in contravention of the requirements of the 14th Amendment." This Court, in reversing the decree,

upheld the contention of the company and stated (at page 300):

> "First, the fundamentals of the trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record."

The Court further, at page 302, used this language:

> "From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular evidential facts of which the Commission took judicial notice, and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial review of the decision to challenge the deductions made from them. The opportunity is excluded here. The Commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to journals and tax lists, as if a judge were to tell us, 'I looked at the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms." (page 302.)
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> "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *Ibid* 304.

In *Morgan v. U. S.*, 298 U. S. 468, this Court held, page 480:

> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The hearing is designed to afford the safeguard that the one who decides it be bound in good conscience to consider the evidence, to be guided by that alone, and to reach its conclusion uninfluenced by

extraneous considerations, which in other fields might have played in determining purely executive action.

> "The hearing is a hearing of evidence and argument. If the one who determines the facts which underly the order has not considered evidence or argument, it is manifest that the hearing has not been given."

The Supreme Court of Ohio has likewise pronounced this principle, which has guided litigants in trials of cases in our state for many years, holding,

> "The entry of a judgment does not and cannot accomplish substantial justice when the record makes clearly manifest the fact that substantial rights guaranteed by the law and constitution have been denied the party against whom the judgment operates."
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> *Taylor v. Schlichter,* 118 O. S. 131, 144.

The requirement of a fair trial by an impartial tribunal, which shall render judgment upon the evidence legally before it, based upon legal principles given it for its guidance, is not met, we respectfully submit, where, as here, without an opportunity to read the ordinances, without which the entire cause of action fails, and without testimony before it whether any such ordinance is by its terms applicable to buildings constructed before its passage, without affording the defendant the opportunity to produce testimony that such ordinance under Ohio Law is not applicable to defendant's building, or at least "to challenge deductions made from" the trial court's cursory and superficial reading of a portion thereof to them, a jury is permitted to render a verdict against a defendant, upon which verdict judgment is thereafter rendered against him. It is as though one suing upon a promissory note were granted a judgment without having introduced the note into evidence, even though the maker may have admitted that such note was in existence.

We do not contend that in order to obtain a fair trial commensurate with the principles of due process, a court cannot include in its charge or omit therefrom matters not

substantially affecting the rights of the parties. Where, however, issues are defined to a jury as having been made on facts which are not existent in the record, as where the jury is advised that if they find that the defendant failed to provide "sufficient light," he violated an ordinance and was therefore negligent, when no such ordinance was in the record; and where a trial judge fails to rule upon an objection to the applicability of such an ordinance depriving the objector of the right to refute or explain his non-compliance, he is unfairly disadvantaged and is denied a full and fair hearing as contemplated by the 14th Amendment to the United States Constitution. Upon the application for a rehearing the Ohio State Supreme Court had this question before it, fully briefed and thoroughly presented. That Court, however, denied the defendant's application in contravention, we maintain, of due process guaranteed by the 14th Amendment.

It is clear that the judgment rendered against the defendant, which was reversed by the Appellate Court but affirmed by the Supreme Court of Ohio, could not have been based on "facts and circumstances, which ought to be considered" and, "were excluded from consideration." Such judgment did not embrace "basis facts" necessary to its validity, as enunciated by this Court in *Morgan v. U. S.*, 298 U. S. 468, 480, because:

1. The ordinances, as the Court of Appeals found, were not in evidence.
2. The record could not under the circumstances of this case contain evidence to refute the applicability of such ordinances to the building in question, because of the court's failure to rule on the defendant's objections thereto.

The result of the case at bar cannot be said to be governed by the "impartial application of principles which are known and established," as are set forth to be the minimum requirements of a judicial proceeding.

The fundamental fallacy in the judgment of the court below, we respectfully contend, is in its sacrifice of substance upon the altar of simplicity in procedure. It denied the defendant due process. From its syllabus it is manifest that the ordinances so essential to the determination of the issues were not introduced by the plaintiff. It says, however, that the defendant's admissions were tantamount to a concession. The Court of Appeals could not find such concession. The trial court's statement (Record, page 23), indicates no such concession, but manifests clearly that for the purpose of the record, defendant counsel waived only the preliminary steps essential to the production of the ordinances, not the introduction thereof. At page 49, the court below says the defendant cannot complain because he waived the **production** of the ordinance. Certainly, this is recognition of the fact that while the defendant may have waived the production of the ordinances, he did not waive the introduction of any of them.

SUMMARY AND CONCLUSION.

We have undertaken to show that the Supreme Court of Ohio in denying the defendant the opportunity and the right to offer testimony to refute the applicability of the ordinance to the building in question, failed to grant the defendant such hearing as is contemplated by the due process clause of the 14th Amendment to the United States Constitution. We further have undertaken to show that the rendition of a judgment against him sans the vital element upon which the cause of action was founded, to wit: the ordinance, denied him due process as is contemplated by the 14th Amendment.

We likewise contend that these questions were raised in the Supreme Court of Ohio at the first opportunity offered the defendant; that because the Court of Appeals ruled favorably to the defendant's contentions, he was not obliged to raise these questions in the Supreme Court until

after an adverse ruling was made against him. This he did in the application for a rehearing, which the Supreme Court denied.

Your petitioners submit, therefore, that the relief prayed should be granted, and that the decision of the Supreme Court be reviewed by this Court and that upon final hearing said decision be reversed and remanded.

Respectfully submitted,

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